Brief of Petition for Writ of Certiorari

Filed Oct 9, 1897

OCT 9 1897
JAMES H. MCKENNEY
CLERK

169

In Supreme Court United States.

OCTOBER TERM, 1897.

In re FRANK E. PERCE.

Petition and Argument for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In United States Supreme Court.

OCTOBER TERM, 1897.

Ex parte **FRANK H. PIERCE.**

The petition of Frank H. Pierce, respectfully shows:

I. That, being a citizen of Alabama, on the 22 January, 1892, he brought suit, in the Circuit Court of Jefferson county, for that State, against The Tennessee Coal, Iron and Railroad Company, a corporation, for damages for breach *in toto* of a contract in writing entered into between said defendant and petitioner. The said contract so sued on is set out in the complaint filed, which is shown on pages 13-14 of the record filed herewith.

II. That said defendant appeared in said cause and filed demurrers to the complaint—and the demurrers were sustained by said Circuit Court—and, your petitioner standing upon his complaint as filed and refusing to amend, final judgment was rendered in favor of the said defendant.

See demurrers, Record 17; Judgment, p. 18.

IIII. That petitioner appealed said cause to the Supreme Court of Alabama, when the cause coming on regularly to be heard, the said judgment was in all things reversed, The said Supreme Court holding, after full argument, that said contract so sued "bound the defendant to its performance, so long as plaintiff should be disabled by reason of the injuries he re-

ceived, which under the averment that he was permanently disabled, will be for life."

The opinion of said court is reported in 110 Ala. Rep., 533.

IV. That said cause being remanded to said Circuit Court of Jefferson county to be proceeded with in accordance with the ruling of the Supreme Court, the said defendant, norminally on the ground of local prejudice but really to avoid the effect of said ruling, had said cause removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, upon the petition and proceedings shown in the record herewith filed, pages 1 to 21.

V. That petitioner moved said Circuit Court of the United States to remand said cause to the State Court, but said motion was refused.

See Record, 21-22.

That afterwards said cause came on to be heard and petitioner recovered a judgment against defendant for the sum of $5,893.00.

VI. That the plaintiff and defendant each took a bill of exceptions and appealed by writ of error from the said judgment to the United States Circuit Court of Appeals for the Fifth Circuit—and that said cause came on to be heard in June, 1897, and on such hearing the said United States Circuit Court of Appeals rendered a judgment and filed an opinion therein, shown in the record herewith filed, holding that petitioner had shown no cause of action in his said complaint, and that the demurrers interposed in the State Court and which were overruled by the State Supreme Court and which were allowed, against petitioner's objection, to be reconsidered in the said Circuit Court of the United

States, were good, and directed the said Circuit Court of the United States to dismiss thereon petitioner's said action.

VII. That said cause has been remanded to said Circuit Court of the United States to be proceeded with in accordance with the said judgment of the Appellate Court and will be dismissed at the approaching term of said court, unless restrained by the order of this court.

VIII. That the said defendant below did not, as required by law in the case of removal of causes, file a full and complete transcript of the record and proceedings of the State Court in said cause, but omitted therefrom all the proceedings of the said Supreme Court of the State therein. That nevertheless, although said omission was shown on the record produced and filed by said defendant, (See Record, p. 20) the said Circuit Court of the United States refused to remand the same to the State Court and retained jurisdiction of said cause, as did the said Circuit Court of Appeals, giving the said defendant the benefit of the omission by its own fault of said proceedings in the Supreme Court from the record, so as to avoid the estoppel thereof against the said defendant. Nevertheless, in the argument of said cause by counsel, both in the lower and appellate courts, the fact of said proceedings in the Supreme Court of the State were conceded and the opinion of said Supreme Court was attempted to be avoided by insisting that it was not binding on the Federal Court and also that the amendment of the complaint in the Circuit Court of the United States shown on page 25 of the record, stated a new cause of action, whereas said amendment in no manner changed the substance of the contract declared on and construed by the State Supreme Court.

Inasmuch as petitioner is without other remedy, and as he is entitled to the benefit of the construction of his said contract by the Supreme Court of the State of Alabama, he prays that this Honorable court will grant to him a writ of *certiorari* directed to the said Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to this court the record and proceedings in said cause of the Tennessee Coal, Iron & Railroad Company, plaintiff in error versus Frank H. Pierce, defendant in error, and of Frank H. Pierce, plaintiff in error versus Tennessee Coal, Iron & Railroad Co., defendant in error, that full and ample justice may be done in the premises by the review thereof by this Honorable court, which petitioner prays may be had and done. And petitioner will ever pray.

FRANK H. PIERCE,
per W. A. GUNTER, his Attorney.

UNITED STATES OF AMERICA,
Middle District of Alabama.

William A. Gunter, being duly sworn, doth depose and say:

I was the attorney for said Frank H. Pierce in said suit above mentioned, and conducted the same for him throughout all the proceedings therein up to this application, and I know and state that the matters set forth in the foregoing petition of said Frank H. Pierce are true as therein stated.

Sworn to and subscribed before me, J. W. Dimmick, ~~U. S. Commissioner~~ and Clerk of U. S. Court for the Middle Dist. of Ala., this 9 day of August, 1897.

W. A. GUNTER.

In Supreme Court United States.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

Brief for Petitioner by W. A. GUNTER.

Statement of the Case.

Pierce sued in the State Circuit Court upon a contract set out in the complaint, Record, p. 13; the defendant, the Tennessee Coal Iron & Railway Co. demurred. The court sustained the demurrer, the plaintiff refused to plead over and judgment went for defendant. On appeal this judgment was reversed, the court construing the contract sued on to the effect that plaintiff had stated a good cause of action and that defendant was bound by the contract to pay the monthly payments stipulated to be paid as long as plaintiff was disabled, and if he was permanently disabled as alleged that it would be for life. The case is reported in 19 South. Rep. 22 and 110 Ala. 533. When the case went back to the State Circuit Court the defendant below removed it to the Circuit Court of the United States sitting at Birmingham, Ala., on the ground nominally of local prejudice, but really to escape the decision of the Supreme Court of the State. The defendant omitted from the transcript filed in the Circuit Court of the United States, all the proceedings

in said case in the Supreme Court, and, though such omission was apparent from the record filed (see Record, p. 20), the said Circuit Court refused petitioner's motion to remand said cause to the State Court, and retained jurisdiction thereof, as did said Appellate Court. Record, p. 21.

The defendant insisted that the same demurrers decided by the Supreme Court of the State Court should be retried by the Circuit Court of the United States and they were so retried and overruled. Record, p. 28.

The plaintiff amended the complaint by inserting in the contract a line omitted in copying but not altering the legal effect and substance of the contract. (See Record, pp. 25-6 for amendment). The defendant interposed same demurrers and they were again overruled. Record, p. 28.

The case then went to trial and plaintiff had judgment for $5,893.00—and both parties brought same to the Circuit Court of Appeals.

The Appellate Court held that the demurrers which had been overruled by the Supreme Court of the State were good and directed the Circuit Court to dismiss the case thereon.

It is deemed unnecessary to state more of the case on this application, since the only available ground to be urged in a case of this kind for the writ of *certiorari* is the retention of jurisdiction in the absence of a full record from the State Court, by the fault of the party removing the case, or the refusal to respect and observe the *res judicata* of the case established by the decision of the State Supreme Court.

If the court can and will regard the proceedings in the State Supreme Court as part of the case, as was done in Forsyth v. Hammond, 166 U. S. 506, petitioner would prefer the case to remain and be tried in this jurisdiction.

ARGUMENT.

The defendant below having had a trial in the State Court on its demurrers, the construction placed upon the contract, which was directly involved in the demurrer, became the law of the case which followed it when it was removed to the Federal Court.

Davis v. St. Louis, etc., 25 Fed. Rep. 786.
Cleaver v. Traders Ins. Co. 40 Fed. Rep. 863.
Williams v. Conger, 125 U. S. 397-418.
Ib. 40 Fed. Rep. 711 and cases there cited.
Northern Pac. R. R. Co. v. Ellis, 144 U. S. 458.
Clark v. Keith, 106 U. S. 464.

The reversal and judgment by the State Court stood as if by this court. The amendment of the complaint did not affect the substance of the contract since it consisted only of the addition of an alternative clause in the recitals of the contract anterior to the contractual part. See amendment, Record, p. 25. The *res judicata* was therefore complete.—Ib.

The proceedings in the State Supreme Court were treated by the courts and counsel as in the case—they were omitted from the transcript by the fault of the party removing the cause, who therefore, cannot take advantage of its own wrong. This court may, like the other courts, look at these proceedings and measure the parties rights by them. It is no objection to granting the writ prayed, that the lower court has not yet obeyed the injunction of the Appellate Court to dismiss petitioner's cause.

Forsyth v. Hammond, 166 U. S. 506.
Am. Const. Co. v. Jacksonville Rw., 148 U. S. p. 384.
The Conqueror, 166 U. S. 110.
The Three Friends, 166 U. S. 1.

It is against public policy and the regularity of judicial procedure to permit parties, on any pretense, to escape the *res judicata* of one jurisdiction by a removal of the cause into the Federal Courts, and for the latter courts not to observe and respect the decisions of the State Courts.

This case, therefore, seems to fall directly within the rules regulating the granting of the writ of *certiorari* as stated in Forsyth's case at pages 514-15 of 166 U. S. Rep.

W. A. GUNTER,
Atty. for Petitioner.

W. A. Gunter
Atty for petitioner

In Supreme Court of the United States

OCTOBER TERM, 1898.

No. 174.

FRANK H. PIERCE, *Petitioner*,

versus

THE TENNESSEE COAL, IRON & RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court Appeals for the Fifth Circuit.

Argument for F. H. Pierce on his Writ of Error and on the Writ of Error of the Tenn. C., Iron & R. R. Co., by W. A. GUNTER.

AS TO THE CERTIORARI.

This writ having been awarded on a printed argument, we beg to refer to that for the matters connected with the granting of the writ. We suppose that the propriety of granting the writ is no longer a question in the case, and we do not discuss it further.

STATEMENT OF THE CASE.

This was an action brought in the State Circuit Court, by Pierce, against the Tennessee Coal, Iron & R. R. Co., for damages for the breach of a contract set out in the complaint.

The defendant demurred to the complaint, the court sustained the demurrer, and the plaintiff refusing to plead over, judgment went for the defendant. On appeal to the Supreme Court of the State,

this ruling was reversed. The case is reported in 19 South. Rep. 21, and 110 Ala. 533.

When the case went back to the Circuit Court the defendant had it removed to the Federal Court, on the ground that there was no chance for it to obtain justice in any State court open to it.

On the trial in the Federal Circuit Court the plaintiff had judgment for $5,893.00, and each party brought a writ of error.

The nature of the case is this: Pierce, being in in the employment of the defendant corporation, was seriously injured in May, 1888, by a train of cars operated by defendant in a coal mine. In compromise and settlement of the claim for damages, the defendant entered into the contract sued on—to give Pierce such work as he could do in his disabled condition, and to pay him $65 per month in money and certain supplies, valued as at least worth $5 per month—bnt soon discharged him, insisting that ihe hiring was at the will of the defendant.

The suit is for damages, *in solido*, for the renunciation and total breach of the contract by the defendant. The contract is set out in the complaint in these words:

"4th of June, 1890. Whereas, I, F. H. Pierce, while in the employ of the Tennessee Coal, Iron & Railroad Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine, known as Slope No. 2, and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said Company liable to me for damages; but, whereas, they disclaim any liability for said accident or injuries to me resulting from same, and both parties being desirous of settling and compromising said matter; and, whereas, the said Tennessee Coal, Iron & Railroad Company did make me a proposition on the — day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such sup-

plies from the commissary at No. 2 prison as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling and the benefit of the convict garden at No. 2; and, whereas, said proposition was accepted by me and carried out by said Company; and, whereas, in May, 1889, after I had resumed work, a further proposition was made to give me work, such as I could do, paying me therefor the wages paid me before said accident—that is, $60 a month—and, in addition, free house rent; *or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent;* and, whereas, said agreement has been faithfully kept by both parties; and, whereas, on the 4th day of June, 1890, it is mutually agreed between myself and the said Company that it will be better to give me the house rent than the supplies of about equal amount from the commissary. Now, therefore, it is agreed that, in view of the above propositions which have been faithfully carried out, that my wages from this date are to be $65 per month, and, in addition, I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege, and I, on my part, agree and bind myself to release the said Company from any and all liability for said accident or injuries resulting to me from it, or from the effects of it, and agree that this is to be full and a satisfactory settlement of any and all claims which I might have against said Company.

F. H. Pierce,
G. B. McCormack.

Witness: P. J. Rogers,
Erskine Ramsey."

The demurrers interposed in the State Court, as shown at large on page 17 of the record, resolved themselves into two propositions:

1st. That the contract fixed no time of performance, and was a contract of hiring determinable at the will of either party.

2nd. That the contract shows it was not entered into by defendant, but by plaintiff and G. B. McCormack.

The Supreme Court held that there was no merit in either of these contentions. 19 So. Rep. 22; 110 Ala. 533.

When the case came on to be heard in the Federal Circuit Court the defendant insisted that the court should pass again on its demurrers, which had been overruled in the Supreme Court, and accordingly the court reheard and overruled those demurrers.

Record 28.

The plaintiff then amended his complaint by inserting in the contract a clause left out in copying. This clause is shown above in copy of contract by italics.

The defendant again interposed the same demurrers and the court again overruled them.

Record 28.

The defendant then interposed four pleas, shown on pages 24, 25 and 27 of the record.

The plaintiff joined issue on the 1st, 3rd and 4th and demurred to the 2nd plea, and the demurrer was sustained.

The second plea, in short, is that the plaintiff, after service under the contract, refused to further perform, and that defendant thereupon discharged him.

Record 24.

The demurrer is that the plea did not go to the whole consideration of the contract, and was no answer to the entire action.

Record 26.

The case was then tried upon the first plea, which was the general issue, the third, which was *non est factum*, and the fourth, which was one of recoupment for damages sustained by the loss of plaintiff's service under the contract.

ERRORS RELIED ON ON PIERCE'S WRIT OF ERROR IN THE APPELLATE COURT, ALSO HERE.

Although there are four assignments of error by Pierce, Record 65, they all substantially involve a single point, viz:

The right of the plaintiff to recover full and final damages for the total renunciation of the contract by the defendant. The defendant was to pay plaintiff during his disability, which under the evidence was permanent, the sum of sixty-five dollars per month in money, and supplies, which were conceded to be worth five dollars per month—total, seventy dollars—and, having renounced the contract, plaintiff sought to recover damages beyond the day of trial for the expectancy of his life. The court, however, refused to admit, and, on motion of defendant, excluded all evidence on the trial showing the plaintiff's expectancy of life; that is, evidence as to the plaintiff's age, health, habits, and the American tables of mortality, used by insurance companies, showing the expectancy of life at different ages, on the ground, as announced by the court, "that it would allow no recovery on the contract beyond the installments of wages due and in default up to the date of the trial, . . . because damages for the expectancy of life was a matter too vague and uncertain to be allowed."

Record 61-2.

The bill of exceptions, Record 61, on this point, is as follows:

"The plaintiff also introduced evidence showing that the plaintiff at the time of his discharge by defendant from its employment in May, 1891, was 55

years old, that he was then, and has been since, in good health, and that he was addicted to no habits of drinking or otherwise affecting his health and expectancy of life, and introduced the American tables of mortality used by insurance companies, showing the expectancy of life of plaintiff at the time of his discharge from defendant's employment, and at the time of the trial."

The same point was also raised in the written charges refused to the plaintiff below. There are two of these charges, but, as they cover the same ground, only one will be quoted. No. 2 is as follows:

"If the defendant, after making the contract sued on, and before the suit, refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff and discharged him, the plaintiff is entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as defendant may have sustained from the loss of plaintiff's service without defendant's fault."

Record 63.

It is insisted that the circuit court erred in excluding the evidence shown above to have been excluded, and in refusing the charge quoted above, and that the appellate court erred in not reversing the case for the error.

LAW POINT.

On the total renunciation of a contract by a party thereto, the person against whom it is renounced, if in other respects entitled to damages, is entitled to recover full and final damages in one action.

And if the contract is for the payment of money during the life of a person, the damage recoverable is the present worth of the money so to be paid during the expectancy of life of such person, to be estimated upon and in view of all the matters which enter into a correct estimate of life, such as the health, age and habits of the person, and human experience on such subject shown in the standard tables of mortality.

Schell v. Plumb, 55 N. Y. 592.
Howard v. Turner, 71 Ala. 434.
3 Ency. of Law, 1 ed. 904-6.
Nicksburg v. Putnam, 118 U. S. p. 534.
Frazier v. E. T., V. & G. R. R., 12 S. W. Rep. 537.
Shover v. Myrick, 30 N. E. Rep. 207.
Penn. Co. v. Dolan, 32 N. E. Rep. 804.
Kentucky Cement Co. v. Cleveland, 30 N. E. Rep. 802.

ARGUMENT.

The plaintiff below would be very well content for his recovery to be limited, as Judge Boarman limited it, to the installments due and unpaid up to the date of the trial, if the law permitted him to sue for future installments. But, as there can be but one recovery on a suit for a total breach and renunciation of a contract, the plaintiff thinks it unreasonable to confine the recovery to amounts past due at the date of the trial.

We can imagine a contract to pay any amount per annum for a very long time, or for a given life, in which the full consideration has been received in advance for all the payments which are to follow. And there may be an absolute renunciation and total breach of the contract before the first payment is made. And, on suit brought, would it not be the height of injustice to say that the plaintiff, who has parted with the equivalent of all the payments, shall have back, as full damages, only the first in-

stallment, or such as happen to be due up to the trial?

The court seemed to think, and so decided, that "damages for the expectancy of life was a matter too vague and uncertain to be allowed."

Record 62.

Here was a man who, by contract, founded on sufficient, and therefore adequate, consideration, was entitled to seventy dollars per month for life, and, when he sues for a total breach, the court says: "You may recover seventy dollars, if that is the amount past due when the trial is had, but there is no human experience by which we can determine your probable life so as to give you the present worth of all the payments you would receive under your contract, and, therefore, you must take seventy dollars, or such sum as is due under the contract at the trial, in full satisfaction."

Does not every man and every court in the world habitually and constantly act on the exact reverse of this, as being entirely feasible and a necessary concomitant of human transactions? When a horse is valued, does not the jockey look first at his teeth to determine his probable expectancy of life, and carry forward that information as a factor in solving the problem of the present worth of the annual services of a horse of that expectancy in the business for which he is suited?

So when a life is insured, is not the same enquiry made, and is not the premium regulated by the expectancy of life of the insured? Does not each party to the contract calculate fully, and, in general, with accuracy, how long premiums will be paid, and when the policy will fall in?

And so, when this identical contract was entered into, if we suppose it to have been between men capable of such simple calculations, which we are obliged to assume, we are forced to the conclusion that Pierce accurately or roughly estimated his probable life and the payments he would receive

under his contract for the consideration paid for it; and, on the other hand, that the defendant corporation, making the same calculation, balanced the amount thus estimated to be paid to Pierce against what Pierce was to render as its equivalent, and that each, well knowing the consideration on each side, made the engagements shown by the contract.

Notes to Carnig v. Carr, 35 L. R. A. 575.

Now, when one party receives its consideration and renounces the contract on its part, and a suit for damages or compensation is brought, are the courts unable to unravel the very transaction the parties made? Where is there such vagueness and uncertainty in the matter that it is incomprehensible to the science of the law and beyond the grasp of even average jurors?

In truth, there never was a simpler problem before a jury. Can not the experience of man furnish data sufficient to say, what will be the probable duration of the life of a person of a given age, in a healthy district, in good health and of good habits, and who has secured subsistence of seventy dollars per month for life? How is the value of annuities calculated? And was not Pierce's contract a plain annuity of seventy dollars per month for life?

How is a dower interest ever reduced to a money value, or a remainderman's interest calculated, but on the theory of the simple problem here involved, open to the understanding of every man?

The authorities are equally plain on this matter.

The object of awarding damages for breach of a contract, or for an ordinary tort, is to afford compensation for the injury. And the usual measure of the damage upon a breach of contract is "the amount that would have been received if the contract had been kept."

Benjamin v. Hilliard, 23 How. 149-167.

"In an action for a personal injury" (and *a fortiori* for breach of contract), "the plaintiff is entitled

to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by defendant's negligence."

And "in order to assist the jury in making such estimate" (that is, of what plaintiff would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant), "standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity are competent evidence."

Vicksburg, &c., v. Putnam, 118 U. S. p. 534.

In the case of The D. S. Gregory, 7 Fed. Cases 1122, affirmed in 9 Wall. 513, the plaintiff was injured by a collision of two vessels and sued for her damages, and not on a contract adjusting the damages, as here, and she was allowed to show her age, her health, and the expectancy of her life by the mortuary tables, and her earnings per month. The court thus makes the simple calculation: "She was receiving, at the time, $12 per month and her board, as wages. She was a competent and faithful person, and capable of continuing to earn that amount. She can no longer earn it. . . . This, then, is a loss to her of $144 a year and her board, which it is reasonable to put at $6 a week or $312 a year, making a total of $456 a year. The libellant was, at the time of the accident, about forty years of age. The sum required, according to the Northhampton tables, to produce, at that age, an annuity, for life, of $456 is $4,881.48. . . . Thus much the libellant is entitled to recover, as if she were a portion of the cargo of the ferry boat, which its owner is entitled to have restored, repaired and replaced in the condition in which it was at the time of the collision."

In the case at bar, the defendant and plaintiff below adjusted and merged the claim for damages by the latter into the engagement by the former to pay $70 per month for life of plaintiff, and the question

here is, whether we cannot as well calculate the sum required to produce, at the plaintiff's age, an annuity of $70 per month for his life, as the court and jury could calculate the damage of the plaintiff, in the case of 7 Fed. Cases *supra*, who was receiving in monthly installments, but for life, wages of $144 and supplies of $312 per annum?

We are unable to discover any difference whatever in the principles involved in the problem of the two cases, and we can discern nothing in the case at bar to make us unequal to the undertaking, so easily solved by Judge Blatchford in the other case.

It is perhaps very true that Pierce might have elected to regard the contract as alive and have sued each month during his life for the sum to be paid him by the month under the contract.

Mullaly v. Austin, 97 Mass. 30.

Liddell v. Chidester , 84 Ala. 508.

3 Ency. of Law, 1 Ed. 904–6.

But, when a contract has been renounced by one party, it is a total breach, entitling the other party to sue for and recover single damages, and, if such action is brought, as is here done, there can be but one recovery. (110 Ala. 533 ; 71 Ala. 434 ; 84 Ala. 508.) And as that recovery must, to be just, respond to, and compensate for, the entire injury, it must necessarily give the plaintiff the present worth of all the sums he would have received under the contract if it had been kept. Or, to apply the rule in this case, the value of an annuity of $70 per month for the life of the plaintiff below. The only uncertain element in the calculation is the duration of the plaintiff's life, and this is solvable by a knowledge of his health and habits and of the standard mortuary tables showing the expectancy of his life.

Foster v. Hilliard, 9 Fed. Cases 549.

Frazier v. E. T., V. & Ga. R., 12 S. W. 537.

Shover v. Myrick, 30 N. E. Rep. 207.

Penn Co. v. Dolan, 32 N. E. Rep. 804.

Kentucky Cement Co. v. Cleveland, 30 N. E. 802.
Cooke v. Cook, 110 Ala. 567.
Schell v. Plumb, 55 N. Y. 592.
Sauter v. N. Y. Central, &c., 66 N. Y. 50.
Parker v. Russell, 133 Mass. 74.
Amos v. Oakley, 131 Mass. 413.
Remelee v. Hall, 31 Vermont, 582.
Mullaly v. Austin, 97 Mass. 30.
People v. Security L. I. Co., 78 N. Y. p. 128.
Grove v. Youell, 33 L. Rep. Annotated 297–9.
Kinney v. Folkerts, 48 N. W. Rep. 283–285.
Howard v. Turner, 71 Ala. 434.
Tenn. C., I. & R. Co. v. Pierce, 110 Ala. 533.
Fales v. Hemenway, 64 Me. 373.
3 Ency. of Law, 1 Ed. 904–6.

It is thus clear, beyond all question, that the Circuit Court erred in limiting the plaintiff's recovery to the amounts in default at the trial and in excluding evidence to show the expectancy of his life with a view of estimating the payments likely to be due under the contract in the future.

Argument on Appeal of Tennessee Coal, Iron & R. Co.

There are twenty-seven assignments of error insisted upon by the defendant below, but each assignment need not perhaps be considered separately.

If the court was correct in giving the charge shown by the sixteenth assignment, R. 53, which was that the plaintiff was entitled to recover the installments past due at the trial, many of the other questions are at once eliminated.

Demurrers to Complaint.

The defendant below had a trial on its demurrers to the complaint in the Supreme Court of the State. That court construed the contract sued on, holding that it was an engagement for life if the disability was permanent.

The lower court therefore had no right to reconsider the demurrers which had been overruled in the Supreme Court. The rule is perfectly well settled that when a cause is removed to a Federal court it stands precisely as it stood in the State court before removal. The parties stand concluded by previous proceedings as they would have stood in the State court.

Brewer, J., in Davis v. St. Louis, etc., 25 Fed. Rep. 786.

Cleaver v. Traders Ins., 40 Fed. Rep. 863-4.

Williams v. Conger, 125 U. S. 397-418.

Cleaver v. Traders Ins. Co., 40 Fed. Rep. 711, and cases there cited.

The cases in 125 U. S. 397 and 40 Fed. Rep. 711, had prior to removal been decided, as this case, in the State Supreme Court, and it is said in both of them, the last following the first, that the decision of the State Supreme Court stands precisely as the decision of the United States Supreme Court in the identical cause, and that it (the Supreme Court) would feel itself bound by the judgment, as fixing the law of the case, and would not allow it to be questioned at its bar, and much more would not allow a *lower court to review it.*

The spectacle we have presented in this case then is, that of the circuit court reviewing the judgment of *this court*, for this court stands, *quo ad hoc*, as having given the judgment of the State Supreme Court, to be seen in 19 So. Rep. 22 and 110 Ala. 533.

This court may feel complimented, however, that the circuit court sustained its interpretation of the contract as shown on the former appeal, as these demurrers were again overruled.

Record, 28.

The plaintiff inserted, by amendment, in his complaint the following clause, in the recital part of the contract, which had been omitted in copying, viz.:

"*Or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent.*" The position of this amendment in the contract is shown by the clause in italics in the contract set out on page 3 of this argument.

The defendant, mindful of the conclusiveness of the ruling of the State Supreme Court on the demurrers, sought to avoid it by re-interposing the same demurrers to the complaint as amended, on the idea that the amendment might authorize a different construction of the contract to that put upon it by the Supreme Court.

Record, 28.

The circuit court again overruled the demurrers to the complaint, and this the appellant assigns as error, No. 1½.

Record, 28 and 51.

It will be observed that the clause inserted in the contract by amendment does not, in the least, alter the *contractual* part of the contract, for the inserted clause is in the *recital* part of the instrument, stating what had before been the engagement, in one respect, of the parties, up to the 4th of June, 1890, under the contract of May 1889, viz., that Pierce should have $60 a month, and in addition free house rent. "*or in lieu of house rent*, a certain amount of supplies from the convict commissary, at No. 2 prison, which supplies were to amount to about the sum paid me for house rent."

It could not possibly make any difference, in the construction of the contract entered into on the 4th June 1890, that under the previous contract the appellant, instead of being bound to pay $60 per month *and house rent*, had an option to furnish supplies of equal value to the amount paid for house rent, instead of house rent. This matter in the contract is entirely historical and preliminary to the new engagement of 4th June 1890, by which, the option

as to supplies being eliminated, the wages were fixed at $65 per month, with coal, wood and garden privileges.

Unless there was by the amendment a substantial change in the contract, so as to make the ruling of the Supreme Court inapplicable, it is of course evident that the *res judicata* on the former appeal was as binding on the lower court as if there had been no amendment.

Williams v. Conger, 125 U. S., p. 418.
Clark v. Keith, 106 U. S. 464.
Northern P. R. v. Ellis, 144 U. S. 458.

In the case in 144 U. S. *supra*, the court referred to the decision of the Supreme Court of Wisconsin involved in that case, wherein that court having ruled on demurrer (as here) held *itself* bound by the *res judicata*, on a new appeal, as to all "questions legitimately involved," and said: "this is the settled rule in Wisconsin; Lathrop v. Knapp, 37 Wis. 307; 50 Wis. 552, *and in this court;* Clark v. Keith, 106 U. S. 464; Chaffin v. Taylor, 116 U. S. 567; Peck v. Sanderson, 18 How. 42; Hickman v. Fort Scott, 141 U. S. 415. Under these circumstances the judgment of the Supreme Court is not subject to review here."

Of course, then, the circuit court had no authority to review the judgment of the Supreme Court. It therefore committed no error in overruling the demurrers. It should have disregarded them.

But the appellant will say that, by a statute of Alabama, the Supreme Court may, on a second appeal, change its first ruling, and that the Appellate Court succeeded to this power.

Code of Ala. (1886), § 683a; Code of 1896, § 3840.

This is very true as to the State court, but it is no authority for a *lower* court to review and change the ruling of the *Supreme* Court, and, therefore, the lower court stands as much concluded now by a de-

cision of the Supreme Court as if the statute had never been passed.

The assignment of error (No. 1½) relates to the action of the lower court, and that was, in effect, but a refusal to set aside and reverse the order of this court (for the order of the State Supreme Court stands as the act of this court). Nothing, therefore, can be taken by this assignment.

This court does not take power or authority of any sort under any section of the Code of Alabama. This court, as to the effect of its decisions, is not in the least regulated thereby. The State law can not enlarge, any more than it can restrict, the power of this court or the manner of its procedure.

It is true new rights may be created by statutes which the Federal court will recognize and enforce, but such enforcement is according to its own procedure.

Hollins v. Briarfield, &c., 150 U. S. 371.
Indianapolis, etc., v. Horst, 93 U. S. 291.
1 Foster Fed. Proc., § 6.
Morrow S. M. Co. v. N. E. S. Co., 60 Fed. Rep. 341.

If it was in the power of the State court, on a second appeal, under section 683a of the Code of 1886 to put a new version on the contract construed on the first appeal, in 110 Ala. 533, and the appellant wanted the privilege of the exercise of that power it lost it by removing the cause to the Federal court, where no such rule obtains.

When the case was removed to this jurisdiction, thereby the decision of the State Supreme Court was made the judgment of the Supreme Court of the United States, so far as the law of this case is concerned. After that, no matter how erroneous the decision might appear to be, it is out of the power of even this court to alter it, since the law is that a decree once pronounced in a cause on appeal is the unalterable law of that case.

See the rule and authorities in Northern P. R. v. Ellis, 144 U. S. 458.

On this rule and these principles, this court, it seems, would be obliged to reverse the circuit court had it sustained appellant's demurrer instead of overruling it, without regard to the abstract question of error *vel non*. And for the same reason it must reverse the ruling of the appellate court in sustaining these demurrers.

It is entirely unnecessary, therefore, on this view, to consider the merits of the demurrer to the complaint. Nevertheless we will consider the question independently of the *res judicata* arising from the former judgment.

The only substantial question presented by the demurrer is, whether the contract is one of ordinary hiring, by which the appellant was at liberty to discharge the appellee at its option.

The Supreme Court thought the point was too evident to require extended consideration. But we will not dispose of it so summarily, though of the same opinion.

Look at the situation, as disclosed in the recitals of the contract. Pierce "was *seriously* hurt, under circumstances which I (Pierce) *claim* render the said company liable to me (Pierce) for damages." The seriousness of the hurt may be somewhat gathered from the facts, shown in the contract, that the injury occurred in May, 1888, and work, "*such as I could do*," was resumed in May, 1889. Here is a long interval, perhaps of suffering, and a recognition of *permanent disability*. This being the situation, and the appellant, being anxious to settle this claim, obtains from Pierce the absolute "release (of) the said company from any and all liability for said accident, or from injuries resulting to (him) me from it, or the effects of it, and agree that *this* is to be a *full* and *satisfactory* settlement of any and all claims which I might have against said company."

We see very well what Pierce has given, beyond

recall, viz: a release of what he *then claimed* to be a right to damages.

Now, what does Pierce get for this? Let us take first the appellant's construction. The appellant insists that Pierce went into this formal documentary release of his claim for damages, for his serious and permanent injury, for the consideration of being employed *one month*, at the wages he had been receiving before he was hurt.

Russell v. Allen, 108 N. Y. 288.

Notes to Carnig v. Carr, 35 L. R. A. 517.

The appellee insists that the term of the contract to be performed by the appellant is to be construed *contra proferentem*. That the company is bound to the interpretation which it must have supposed Pierce put upon it, if the words will bear it. And that it cannot be supposed for a moment that he would have given up the supposed valuable right of compensatory damages for the paltry consideration of being employed for one month, or at the will of the appellant, which is the same thing. Nor does the contract bear such interpretation. The first proposition made, and which was accepted, was "that they would furnish me such supplies . . . as I might choose to take; pay me regular wages *while I was disabled*, and give me my coal and wood for fuel and the benefit of the convict garden." The next proposition, which was a mere modification of the first, was to give me such work as I could do, paying therefor the wages paid me before said accident—that is, $60 a month, and, in addition, free house rent, or in lieu . . supplies . . equal to amount paid for house rent." The third and last proposition was a mere substitution of five dollars per month, in wages, for "supplies," the motive and purpose of the lass modification being shown in the recital; "and whereas, . . it is mutually agreed . . that it will be better to give me house rent than the supplies of about equal amount," upon which immedtately follows the final

agreement which says that "My wages *from this date* are to be $65 per month," with coal and wood and the garden privilege. We thus are enabled easily to understand the consideration Pierce was to receive. He was to have "*regular wages*' and certain supplies, "while I (he) was disabled." The next modification was to give him, and to require him to perform, "such work as I (he) could do." There was in this a change of what Pierce was to do, but none in what appellant was to do. It was still to pay "regular wages" while Pierce "was disabled." And the last change was merely to substitute money, to the amount of five dollars, for supplies from the commissary, the "wages *from* this date" being $65 instead of $60; the time *for which* said wages were to be paid being determined by the first contract, viz: during the disability.

This is the only reasonable interpretation which can be put upon the words of the instrument.

It is the only interpretation that Pierce, or a man in his situation, would have accepted.

Carnig v. Car, 35 L. R. A. p. 517.

Russell v. Allenton, 108 N. Y. 288.

Nor is it an interpretation at all hard on the appellant, for the work which Pierce was able to do in his disabled condition was worth, according to the testimony of appellant's own witnesses, all that it agreed to pay him. "Sixty or sixty-five dollars (per month) would be a reasonable value for the work he did in running the compressor."

Record 43.

We have a right to look at this evidence merely to place ourselves in the situation of the parties when the contract was made; to show that appellant knew it would get "in work" as much as it was to pay Pierce, and thus that it would not be unreasonable for it to contract to pay permanent wages for an equal amount of work, if it could get the absolute release thrown in.

It is evident, then, that the Supreme Court of Alabama was entirely correct in ruling on the demurrers as it did, and that this court would adopt its ruling, if the question was not already concluded.

The appellate court committed clear error in ruling to the contrary of this, and in reversing the law of the case as settled on the former appeal.

DEMURRER TO PLEA NO. 2.

This plea is by confession and avoidance. It admits everything alleged in the complaint, but for answer says, and as a full answer, that the plaintiff quit work without excuse and that therefore appellant discharged him absolutely.

It is an elementary rule, "that every pleading must be an answer to the whole of what is adversely alleged."

Stephen on Plead., m. p. 216.
Nesbitt v. McGehee, 26 Ala. 748.

It is likewise just as elementary, that a contract cannot be rescinded in part; and that if the situation is such that there cannot be a rescission *in toto*, so that the parties can be placed *in statu quo*, any breach by one party can only be compensated by damages.

Shields v. Barrows, 17 How. 130.
Snow v. Alley (144 Mass.) 11 N. E. Rep. 764.
Neal v. Reynolds, 16 Pac. 785.
Jones v. Anderson, 82 Ala. 302.
Henry v. Allen, 93 Ala. 200.
Perley v. Balch, 23 Pick. 286.
Coolidge v Bingham, 1 Metc. (Mass.) 547.

The appellant received, as the consideration in part from the appellee, an absolute release from liability from a claim for damages. This was the great inducement to the contract.

Frazier v. E. T., V. & G. R. R. Co., 12 Southwestern Rep. 537.

Snow v. Alley, 11 N. E. 748.
Notes to Carnig v. Carr, 35 L. R. A. 517.

There was no proposition for *restitutio in integrum*, nor was it possible. The appellant, therefore, proposed, by its second plea, to retain the consideration, and repudiate the contract as to the other party.

The case of Snow v. Alley, *supra*, citing many authorities, is a complete answer to this proposition, holding that compensation for damages where restitution is impossible must be sought in some other manner than by a repudiation of the contract.

There was no error, therefore, in the circuit court sustaining the plaintiff's demurrer to the second plea; and for the same reason the appellate court erred in reversing the ruling of the circuit court.

ASSIGNMENT OF ERROR NO. 2, RECORD 51.

The contract sued on is signed by G. B. McCormack, but in its face it purports to be the act of the defendant. The assignment of error is, that this contract was allowed to be introduced in evidence as that of the defendant. The signature of McCormack was admitted as genuine. Before the contract was admitted the plaintiff proved that McCormack was superintendent and manager for defendant, and that he had made for the defendant the several agreements mentioned in the contract, and that he (plaintiff) had worked and been paid under the contract and according to its terms, from 1888 to May 4, 1891, and that he had been discharged by McCormack, and that he had written to McCormack the letter of the 8th of May and received the reply of the 12th shown on page 39-40 of the record, and that the predecessor of McCormack as superintendent hired him originally, that Rogers, an officer of the company, paid the plaintiff under the contract. Record 33-4.

This was sufficient to show that McCormack acted with authority previously given or subsequently ratified.

The appellate court made no ruling on this assignment.

ASSIGNMENT NO. 3, RECORD 51.

This assignment is an objection to evidence showing the character and extent of the injuries received by the plaintiff.—Record 34. This matter was directly involved, since the plaintiff's right depended on the permanency of the disability, which was therefore proper to be proved.

ASSIGNMENTS NO. 4, 5, 13 AND 14, RECORD 51-2.

These assignments relate to attempts to vary a written contract by proof of antecedent matters merged therein.

1 Greenl. on Ev., § 275.

ASSIGNMENT NO. 6, RECORD 51.

This assignment raises the objection that plaintiff could not prove that defendant's superintendent wrote the contract.

The rule is expressed in Noonan v. Bradley, 9 Wall. p. 407, that "one who takes an agreement prepared by another * * should have a construction given to the instrument favorable to him." The proof had to be made to obtain the benefit of this general rule of construction.

ASSIGNMENTS NO. 7, 8, 9, RECORD 51-2.

These assignments cover objections to evidence of the character and behavior of the convict Dunn with whom plaintiff was required to work.—Record 37-8. The evidence was entirely proper when it was introduced and for the purpose of meeting the plea, No. 4, of recoupment for loss of plaintiff's services,

but became harmless from the view taken by the court of the case, by which plaintiff was limited in recovery to the installments past due at the trial. This evidence did not increase the installments, nor affect the rejection of the plaintiff's unconditional tender of performance by his letter of the 8th of May.—Record 39. As plaintiff worked up to May 4th, and he unconditionally tendered service on the 8th, the plea of recoupment was without effect, except possibly for the loss of service for four days, as to which counsel for defendant, on the trial below having disclaimed any purpose to claim, will hardly make claim now. But if he should, this evidence was pertinent as showing good reasons for not working for those four days with a dangerous "wild animal" in the keeping of defendant.

ASSIGNMENTS 10 AND 11, RECORD, 52.

These assignments are objections to the introduction as evidence of plaintiff's letter of the 8th of May and the reply of the 12th.—Record, 39, 40.

The circumstances shown in these letters were part of the *res gestæ* and necessary and proper to be shown if they had transpired *ore tenus*, and certainly no force is lost by their having assumed the more desirable form of writings. The plaintiff had to show a discharge, he also desired to show a tender of performance, both of which the letters showed.

TWELFTH ASSIGNMENT. RECORD, 52.

On cross-examination of defendant's expert, plaintiff asked the question shown in this assignment, to elicit the fact that the witness had made a mistake in one instance, and thus was not proof against mistakes in other instances. It reflected light upon the quality and capacity of the witness, and was therefore proper.

Marler v. State, 68 Ala. 580.

The evidence, moreover, was entirely harmless; it did not increase the amounts due under the contract.

FIFTEENTH AND SIXTEENTH ASSIGNMENTS. R. 53.

The plaintiff proved, by an admitted expert, that the sums past due under the contract to the trial, the evidence being undisputed that no payment was made after April 1st, 1891, and that the payments were $70 per month, amounted with interest to $5,893.00. And the court charged the jury that on the evidence in the case the plaintiff was entitled to recover, and that the measure of damage was the aggregate of the installments past due with interest, and that the amount was $5,893.00. Record, 46.

On the objection to the witness stating the result of the mathematical calculation of the sum of the amounts, of $70 per month, from 1st May, 1891, to trial of this case, in January, 1897, with interest, it is to be observed, that the calculation is a long and an intricate one, much beyond the capacity of the average juror, not one in a hundred of whom could solve the problem. It falls, therefore, directly within the rule laid down in the note to Carter v. Bohem, 1 Smith's Lea. Cases, 286, where it is said: "It appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance; in other words, when it so far partakes of the nature of a science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."

Any one fairly acquainted with mathematics can calculate the present value of an annuity, at any given per cent. and number of payments per annum,

yet it is the constant habit to rely on experts and tables of calculations.

Vicksburg v. Putnam, 118 U. S. p. 534.

Rogers on Expert Testimony, § 160.

On the undisputed evidence the plaintiff was entitled to recover. The contract had been construed so as to give the plaintiff, for life, the right to the payments of $70 per month, if his disability was permanent. The undisputed evidence showed that such was the fact. The plaintiff was a machinist. By the accident one hand was "crushed," one finger torn off," and the hand left weak and so that it could only be half closed and could grasp nothing; one leg was 2½ inches shorter than the other, the bones had been taken out, the ankle crushed or dislocated, so that it could not be bent and was painful to stand upon. The hand and ankle and leg were shown, so that the court could see that the disability was permanent. The plaintiff's occupation of a machinist was gone.

Frazier v. E. T., V. & Ga. R. R., 12 Sou. West 537.

Young v. Travelers Ins. Co., 13 Atlantic, 896.

Walcott v. Mitchell L. & A. Ins. Co., 8 N. Y. Sup. 263.

Hutchinson v. S. T. K. of K., 22 N. Y. Sup. 801.

In the case in 13 Atlantic, *supra*, which was a suit on an accident insurance policy, the insured was a billiard-saloon keeper, and the insurance policy gave him certain indemnity, "if the insured shall sustain bodily injuries * which shall * * *wholly* disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation, &c." and the indemnity was to last, "for such period of *continuous total disability*." The plaintiff admitted that he could do some acts necessary to be done in the business, but claimed that he was wholly disabled from doing many of the mate-

rial acts necessary to be done in the business. The court instructed the jury, that if he was so disabled as that from the disability he could not do every act pertaining to his occupation, he was entitled to recover. This instruction was approved, and the court illustrated its propriety by the case of a barber losing his right hand, and asks, "can it be said that he is not wholly disabled from the prosecution of his business *as a barber?*"

Here, there was practically the loss of one hand and one leg; and the court knows judicially that this is a disability for the prosecution of the calling of a machinist, and that it is permanent.

There was then no answer to the complaint on the first plea. The second plea was eliminated by the demurrer thereto. The third plea was met by uncontradicted evidence of the authority of McCormack, by ratification, if not otherwise, to make the contract. So that the sole question was, whether plea four had been made out, and to what extent. This was a claim of recoupment for loss of plaintiff's work. But the undisputed evidence showed that plaintiff worked up to the 4th day of May; that he made an unconditional tender of further service on the 8th, and that this was unconditionally refused by the defendant.

Record, 33-4-5-6-39-40.

So that plea 4 rests entirely on the possible loss of service for four days, and as to that there was no proof of its value, and, besides, it is shown that there was no *demand* for that service and no refusal to render it.—Record, 34. And beyond this the defendant in the trial below expressly disclaimed any claim for the mere service of four days, and will doubtless do the same here, by not making the point.

The case, then, stood thus before the lower court. The plaintiff showed and proved a liability on a written contract, by the defendant, to pay him $65 in money and $5 worth of supplies, total $70 in

money, per month, from and including the month of April, 1891 to the month of January, 1897; and showed the default in these payments; and the court seeing and appreciating the difficulty of making the calculation to be made, accepted the uncontradicted evidence of an admitted expert as to the result of the problem, and directed the jury to find the amount. The only mistake the court made was that it restricted the recovery to the amounts due up to the trial. It had a perfect right and it was its duty to instruct as it did for the plaintiff.

The case stood precisely as if the defendant had made default, since none of its pleas were in the least sustained, and the complaint was fully made out by uncontradicted evidence. And thus the court had the right to direct the verdict.

North P. R. Co. v. Com. N. Bank, 123 U. S. 727.

Union P. R. v. McDonald, 152 U. S. 262.

Robertson v. Edelhoff, 132 U. S. 624–626.

Deleware, &c., R. v. Converse, 139 U. S. 469–472.

"It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way."—*Ib.*

ASSIGNMENTS OF ERROR 17 TO AND INCLUSIVE OF 27, RECORD 53-4-5.

It is entirely unnecessary to consider these assignments.

If the plaintiff was entitled to recover, as the jury was instructed he was, the several charges asked by defendant were necessarily wrong. But even if the court was wrong in that instruction, the charges were still all obviously wrong and properly refused.

Charge 1 (17th assignment) assumed a fact not proved, and an immaterial fact, since the jury was not required to find the fact whether plaintiff left defendant's service wrongfully, unless it be on the

question of the value of four days service, of which there was no evidence or claim for, since there was an unconditional tender of service after four days, which was rejected.

Charge 3 (19th assignment) asserts that a contract may be rescinded without a *restitutio integrum*, and, in this case, that defendant may hold the main consideration and refuse full performance and rescind *in toto* as to performance on its part.

Charge 4 (20th assignment) asserts in effect that a machinist is not disabled, by the loss of legs and arms, if he can "work" his tongue.

Charge 5 (21st assignment) asserts the same proposition.

Charge 6 (22d assignment). The evidence was undisputed that plaintiff worked till the 4th of May, and that on the 8th there was an unconditional tender of service; the hiatus is four days; there was no evidence of the value of the work of those four days; and besides, this charge *assumes* that the defendant having lost the service of plaintiff for one day, without its own fault, is entitled to the value of such service for the *whole term* of the contract (i. e., for Pierce's *whole life*), though the next day plaintiff tendered full performance, and though plaintiff was only allowed to recover on the contract damages to the day of trial.

Charge 7 (23d assignment) *assumes* that defendant lost plaintiff's service without its fault, and gives defendant the value of that service, by recoupment, for plaintiff's life, notwithstanding the unconditional tender of service by plaintiff in four days, and while plaintiff was not allowed to recover damages *beyond the trial*.

Charge 8 (24th assignment) left the construction of the written contract to the jury. Under that charge the defendant had a right to ask the jury to consider what "disabled" meant "in the contemplation of the contract," and to insist that they

might find that there was no "disability," though the use of both hands, instead of one, was lost.

Charge 9 (25th assignment) raises an immaterial issue. Whether the excuse referred to was good or bad would only affect the question of damage for four days absence, at most, about the value of which there is no evidence, nor is there any claim for this damage.

Charge 10 (26th assignment) raises the same immaterial issue. The question is not, whether the defendant has done wrong in discharging plaintiff, but whether it has done wrong in not paying him. If Pierce had fraudulently intended to do no work when he entered into the contract, and had never tendered his work on the 8th of May, 1891, and had not worked to May 4th, still the defendant could only deduct its damages from the loss of service.

Snow v. Alley, 11 N. E. (144 Mass.) *supra*.

Charge 11 (27th assignment) raises an immaterial issue. The defendant, it seems, should have enquired why plaintiff said he could not work with Dunn, but it made no enquiry, but discharged plaintiff instantly, because he would not risk his life with a drinking, murderous convict in the keeping of defendant.

Record 36.

But this charge, like a number of the others, can have no bearing except as to the loss of service between the 8th and 12th of May, since on the latter day there was an unconditional tender of service and a like unconditional refusal. This is equivalent to performance.

Hepburn v. Auld, 1 Cranch 321.

Frazier v. E. T., V. & G. R. R., 12 S. W. 537.

And as to the service for those four days, it is very clear the plaintiff was not at fault. He was not called upon to do any work.

Record 36.

12 S. W. *supra*, p. 539.

But if he was wholly at fault, there is no proof of the value of the work for these four days, nor any claim therefor; and if there was, and if the proof was made out, it might be said *de minimis non curat lex.*

On the whole, then, there should be a reversal on Pierce's appeal and an affirmance on that of defendant below.

Reply to the Arguments Made in the Appellate Court on Appeal of Tenn. C., I. & R. R. Co.

The counsel for defendant below, in his argument in the Appellate court, besides urging some law points which we think are unsound, refers to some matters *dehors* the record, and again does not state some matters of record quite fully.

For instance, he says the plaintiff below requested the court to give the charge which is the subject of his 16th assignment of error (Record 53), and he insists that thereby the plaintiff waived the exception to the exclusion of testimony relating to the right to recover damages beyond the trial as shown in the first error as assigned by Pierce.—See brief of Mr. Percy. If we refer to the record, pages 46 and 61-2, we will see the *exact* facts upon which he seeks to estop the plaintiff from urging the error referred to. It is said, on page 46, that:

"At the conclusion of the evidence the court stated that it would limit the recovery to the installments of pay due at the commencement of the suit, but, after argument, said that plaintiff should be entitled to installments due up to the trial, and asked defendant's attorney if that was his view of the law, viz: That if the plaintiff was otherwise entitled, whether he should recover for amounts due to the trial, to which defendant's attorney told the court that such was the law, and thereupon the court said it would so rule, and asked plaintiff's attorney to prepare such a charge to the jury, whereupon plaintiff's attorney prepared and handed to

the court this written charge," viz; the one referred to by counsel.

If we further refer to pages 61-2 of the record, we will see that on motion of defendant's attorney, the court excluded all evidence relating to the right to recover damages beyond the day of trial. To which the plaintiff excepted. And, now, this same counsel argues gravely to the court that plaintiff waived the right to assign this error, because he insisted that he was at least entitled to recover up to the trial!

We think the court can very well see that plaintiff in no wise waived his right to full damages, by *allowing* the circuit court to have its own way!

Again counsel says:

"That the Supreme Court of Alabama in its opinion, as originally delivered, held that defendant in error could recover damages during his expectancy of life and beyond the time of the trial, deducting whatever benefit the evidence showed the plaintiff in error was deprived of by the loss of defendant in error's services during the same period. As this was palpably in conflict with the Alabama decisions, limitating the recovery to damages suffered up to the time of the trial, the Supreme Court of Alabama, in response to an application for a rehearing, withdrew that portion of their opinion which related to the question of damages, it being unnecessary to the decision of the case, as it was then presented on the pleadings only."

And the counsel further says: "The charge requested by plaintiff in error, numbered seven (assignment of error 23, Record p. 54), was based on this opinion of the Supreme Court of Alabama, that the benefit which the plaintiff in error was deprived of by the loss of defendant in error's services under the contract, was a proper deduction. Our opinion is that the Supreme Court of Alabama erred in both of its propositions on this inquiry.

This being a contract of employment, the general rule as to the measure of damages for the breach of such contract applies.

That rule is that in an action which treats the contract as continuing and goes for damages for the breach of it in solido, the measure of damage is the loss suffered by the servant up to the time of the trial, deducting therefrom whatever wages he did or could by the exercise of reasonable diligence have earned in the interim in a similar character of employment."

Now, a good many observations may be made upon these statements of counsel. The first of which is, that whatever doubt there may be of our loss in the suppression of that portion of the opinion of the Supreme Court of Alabama referred to by counsel, there is no question that he has given us in his conclusion matter of equal value!

There is nothing like common sense in testing the soundness of views and the value of precedents. Let us bestow a little of it on this announcement of counsel.

First, the supposition is that "the action treats the contract as continuing," and, yet, "goes for damages for the breach it *in solido*." Is not this rather hard to understand? If the last means, or was intended to mean "for a total breach," or "for a total renunciation by the defendant," then it is in conflict with the first, which provides, that the contract is treated "as continuing." An action for a total breach, or for damages *in solido* (*i. e.* single damages) for a total breach, is founded upon the idea that the contract no longer continues, but is at an end, and that a right to damages has taken its place.

Schell v. Plumb, 55 N. Y. 592.

And if the last part of the announcement does not mean what we have supposed, then it has no clear meaning, and has no application to this case,

which is one for damages for a total breach and renunciation of the contract.

To make the announcement of the law, as made by counsel intelligible, we must leave off one of its categories. And as this is a suit for a total breach and renunciation of a contract, we will test counsel's rule of damages for such a total breach.

Suppose Pierce's claim for damages was worth ten thousand dollars, it might be more, it might be less, correct rules of calculation will fit any amounts. Now, to obtain a release of this claim, the defendant says to Pierce: "If you will release this claim absolutely and perform such work as you can do in your disabled condition, and which may be required of you, we will pay you for life seventy dollars per month." That proposition is accepted. The defendant obtains the release, employs and pays Pierce one month and then discharges him. Pierce sues "for damages for the breach of the contract *in solido*," and the trial comes up the next day after the suit is brought, and counsel asserts that the measure of damage is the loss suffered by the *servant* up to the time of the trial, *i. e.*, the wages due between the discharge and the trial *i. e.* nothing!

Now, keeping in mind that the object of damages is to give compensation for the loss sustained by the abandonment of the contract, is it not plain that the rule laid down, so confidently by counsel, applied to the case supposed, would result in a palpable injustice? Common sense says, and the Supreme Court of the United States affirm, as do all authorities, that the damage for the breach of a contract is the present value of the amount that would have been received under the contract if it had been kept. If the consideration has been received and enjoyed by one party, the other party is entitled to receive as damages for the breach of the contract as to him, the value of the consideration agreed to be paid to him, that is to say, the

present value of the money or other thing agreed to be paid. If there are any mitigating circumstances, as that the plaintiff has in the case of a simple suit for a discharge from service had, or might have had other employment, these, of course, may be shown by the defendant in reduction of the damages.

The next observation to be made is, that counsel is mistaken in assuming that this contract is one of employment, pure and simple, to which may be applied his imaginary rule for damages in such cases.

It is true that a *part* of the contract is one of employment by the defendant. It was entitled to plaintiff's services, *such as he could do*, as part of the consideration for the $70 per month agreed to be paid to the plaintiff. But the plaintiff also released to the defendant his claim for damages—this the defendant received and cannot restore, and is the main consideration. In consideration of *this* and *the service*, the defendant sold an annuity of $70 per month to plaintiff, and then renounced the contract *in toto*. The defendant held to the release, refused the service, and its counsel says, if plaintiff refused to perform a single day's service the defendant is liable for no damages.

Is the law so different from the common view as to tolerate such an idea?

Snow v. Alley (144 Mass.) 11 N. E. 764.

The next observation is on the arraignment of the Supreme Court of Alabama for holding that on this contract there was a right to recover damages for life (that is beyond the day of trial), if the disability was permanent. The learned counsel says the Supreme Court took this back, because it "was palpably in conflict with the Alabama decisions."

We must demur to this on several grounds; first, that we are without record evidence as to what the Supreme Court took back; second, that we are in the dark as to why they suppressed a portion of

their opinion; third, that there is no decision of the Alabama Supreme Court holding that in the case of a total breach of a contract such as this and a suit for damages "*in solido*" (*i. e.*, for single and compensatory damages), a recovery can not be had for the expectancy of life; fourth, that the Supreme Court expressly holds, *in the opinion as it stands*, that the obligation to pay *is for life*, if the disability is permanent, and that "contracts for the support or hire of one during his life are binding, and breaches thereof actionable, see Trustees of Howard College v. Turner, 71 Ala. 429, 434, *and cases cited*."

By referring to the case, in 71 Ala. *supra*, we see from what the court says, that the plaintiff was here authorized to treat the defendant's refusal to pay and its discharge, "as a *total breach*, for which *full* and *final* damages could be recovered." *The cases cited are*, Shell v. Plumb, 55 N. Y. 592; Fales v. Hemenway, 64 Me. 373. *These cases* (thus approved) assert the proposition that only *one suit* for damages for the total breach of a contract to support one for life can be maintained, and that *full* damages for the *whole period* can be recovered!! It would be a contradiction for the Supreme Court of Alabama to say, that only *one* suit can be brought, that *full* damages may be recovered for the value of the contract to pay or furnish for life, but that no damages beyond installments due at the trial can be recovered. The Alabama court is far superior to any such conclusion.

The Alabama court adheres to the simple rule laid down by Mr. Parsons in his work on contracts. He says that where there is a total breach and renunciation of the contract, before the whole time expires, an action may be brought at once in which full and final damage for the whole period may be recovered.

3 Parsons on Con., ed. 1866, p. 189.

Remelee v. Hall, 31 Vt. 582.

Schell v. Plumb, 55 N. Y. 592.
Cooke v. Cook, 110 Ala. 567.
Pierce v. Ten. C., I. & R. Co., 110 Ala. 533.
1 Suth. on Dam., 175 *et seq*.

And, in estimating the damage, the Supreme Court of Alabama could hardly have asserted, as no court could hold, that the defendant could recoup for the loss of services which it rejected or never called for.

Frazier v. E. T., V. & G. R. R., 12 S. W. 537.

The facts of this case seem to justify the inference that the defendant below set a trap for Pierce and got caught in it. It induced him to enter into a contract prepared by itself, in which Pierce released the company absolutely, but which the company did not even sign. Record 37. And which it finally signed in the name of an employe. It supposed Pierce was irrevocably bound, and that it had an option to discharge him the next day. That is the contention now. And the facts show that it eagerly availed itself of the first opportunity to set him adrift. It would not be doing injustice to suppose that the company induced Dunn *its wild beast*, to frighten Pierce into declining to work with him, for it made no parley about the matter, no enquiry, but unconditionally discharged him because he said, "I can't work with Dunn."

Record 36.

Finally, we think we are justified in saying that the defendant employed language in the contract to deceive, it adopted a form of contract to deceive, it resorted to ruses to discharge plaintiff and avoid its contract, it rejected his unconditional tender of service, it pleads under oath *non est factum* to its contract, swears that no Alabama jury will do it justice, and after the law of the contract is unutterably settled, asks this court to disregard the *res adjudicata* of the case and adopt as a rule of law; that the measure of damage, for the total renunciation of a

contract to pay an annuity, of *any amount*, for *any number of years* or *lives*, is, at most, the installments due at the time of the trial, which may be nothing, or a large amount, according to the dispatch of justice.

This is the contention of counsel as will be seen when it is analyzed.

The fact that there was to be a *concurrent* rendition of service by the purchaser of the annuity could only affect the damage, by the value of that service, if not rendered, and could not affect it at all if rejected. And as it was rejected here, the contention of counsel is, that the present value of the annuity of $70 per month for Pierce's life, is at most the installments which happen to be due at the trialof the suit for damages "*in solido*" for the breach and renunciation of the contract.

In conclusion, we think that the plaintiff's case standing entirely unanswered and being for a money demand the court should reverse and render judgment for the full value of the annuity.

W. A. Gunby

for F. H. Pierce